

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

**RECEIVED**

AUG 28 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b) )  
Table of Allotments )  
FM Broadcast Stations )  
(Crisfield, Maryland, Belle Haven, Nassawadox, )  
Exmore, and Poquoson, Virginia )

MB Docket No. 02-76  
RM-10405  
RM-10499

To: Assistant Chief, Audio Division  
Media Bureau

**TIDEWATER'S OPPOSITION  
TO COUNTERPROPOSERS'  
MOTION FOR LEAVE TO FILE RESPONSE  
TO REPLY COMMENTS ON COUNTERPROPOSAL**

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August 28, 2002

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## Summary of Pleading

Commonwealth Broadcasting, L.L.C. and Sinclair Telecable, Inc. dba Sinclair Communications ("Sinclair") have filed a pleading denominated "Counterproponents' Response to Reply Comments on Counterproposal" and have filed a motion seeking leave to file the Response. Herein, Tidewater Communications, Inc. ("Tidewater") shows that Sinclair's motion ought to be denied and the Response rejected.

Sinclair may not, at this time, amend and supplement its counterproposal to provide information it omitted from its counterproposal. A topographic map submitted by Tidewater shows Sinclair's reference coordinates to be in a body of water. The Commission should not consider other methods of determining the location of the reference coordinates. The Commission should not consider Sinclair's supplementary information as to the community status of Belle Haven, Virginia, and whether Poquoson meets the *Faye and Richard Tuck* criteria. The Commission should not consider supplemental evidence on whether Station WAZP is an adequate replacement for WROX at Cape Charles, Virginia.

In addition to the defects Tidewater has pointed out, it also appears that Sinclair's counterproposal was inadvertently placed on public notice as it may not be mutually-exclusive with the proposal to allot Channel 250A to Belle Haven, Virginia. The Commission can easily resolve this case by making Sinclair's proposal to relocate WROX to Poquoson the subject of a Further Notice of Proposed Rule Making. Such action would prejudice no other parties.

Tidewater requests the Commission to deny Sinclair's motion and reject the proffered Response.

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**TIDEWATER'S OPPOSITION  
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MOTION FOR LEAVE TO FILE RESPONSE  
TO REPLY COMMENTS ON COUNTERPROPOSAL**

Tidewater Communications, Inc. ("Tidewater"), by its attorneys, hereby opposes "Counterproponents' Motion for Leave to File Response to Reply Comments on Counterproposal" filed by Commonwealth Broadcasting, L.L.C. and Sinclair Telecable, Inc. dba Sinclair Communications (jointly referred to herein as "Sinclair")<sup>1</sup>. In opposition, Tidewater shows the following:

**Background**

Sinclair has proffered a Response which is nothing more than an unauthorized supplement to its defective Counterproposal filed June 3, 2002. Therein, Sinclair proposed (1) the allotment of Channel 250B1 to the hamlet of Belle Haven, Virginia; (2) the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia; (3)

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<sup>1</sup> This Opposition is timely filed by August 28, 2002 (10 days plus 3 days for service by mail, excluding holidays). See Title 47 C.F.R. §1.45(b). Sinclair's Motion was filed August 14, 2002.

the re-allotment of Channel 291A from Exmore, Virginia, to a bedroom community in the Norfolk/Virginia Beach/Newport News, Virginia, Urbanized Area called Poquoson with concurrent modification of the license of Sinclair's WROX, Cape Charles, to operate at Poquoson; and (4) the reallocation of Channel 241B from Cape Charles, Virginia, to Exmore, Virginia, resulting in the removal of the only commercial radio station from Cape Charles. On July 16, 2002, Tidewater filed its "Reply Comments on Counterproposal" showing that Sinclair's proposal was, at the time of filing, fatally flawed, and as a result there was no need to compare it with the conflicting proposal of Bay Broadcasting, Inc., licensee of WBEY(FM), Crisfield, Maryland, to substitute Channel 250A for Channel 245A. Sinclair has now come forth with a totally unauthorized response to Tidewater's authorized Reply and seeks leave to file it.<sup>2</sup> Tidewater demonstrates herein that leave should not be granted and Sinclair's unauthorized response should be rejected without consideration.

In its Reply Comments, Tidewater filed a copy of a segment of a USGS topographic map with Sinclair's reference coordinates plotted thereon. As set forth *infra* Sinclair fails in its response to rebut that showing. Moreover, Sinclair at Response Footnote 14 has asked that the question of whether to allot Channel 291A to Poquoson be resolved in this rule making without regard to whether Channel 250B1 is allotted to Belle Haven. That would render the counterproposal no longer mutually exclusive with the

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<sup>2</sup> Section 1.415 of the Rules specifies the types of pleadings that may be filed in a rule making proceeding. Section 1.415(d) states that "No additional comments may be filed unless specifically requested or authorized by the Commission." At a minimum, Sinclair should have filed its Motion for Leave to File and awaited Commission action before proffering its Response. The Commission should first consider Sinclair's perfunctory motion, deny it and then dismiss the Response.

proposal to allot Channel 250A to Crisfield, Maryland. Such action by the Commission will result in Sinclair's Counterproposal being rejected as inadvertently placed on public notice and dismissed as defective.<sup>3</sup> On July 16, 2002, BBI filed "Comments of Bay Broadcasting, Inc.," in which it showed that Channel 252B1 or 252A could be allotted to Belle Haven in lieu of Channel 250B1. Tidewater strenuously maintains that Belle Haven is not a community for allotment purposes; however, BBI's Comments show that Sinclair's claim that its Counterproposal is mutually exclusive with BBI's proposal was just an artifice to file a counterproposal rather than a petition for rule making that would be subject, itself, to counterproposals. In light of this, the Commission can easily resolve this proceeding by issuing a Further Notice of Proposed Rule Making pursuant to 47 C.F.R. §1.421 to permit Tidewater and other possibly interested persons to submit comments in conformity with 47 C.F.R. §§1.415 and 1.419. The Commission could then quickly grant the WBEY channel exchange without wasting its scarce resources in an attempt to sort out the comparative merits of the two conflicting proposals.

**Sinclair's Unauthorized Response  
May Not Be Considered**

In its "Reply Comments on Counterproposal", Tidewater provided evidence to show that Sinclair's proposal was fatally defective. Sinclair characterizes Tidewater's Reply as "frivolous." It strains credulity that Sinclair can, on the one hand, vociferously claim that Tidewater's contentions are "frivolous" and on the other hand, proffer a hefty one pound, 10 ounce, 162 page pleading to address these "frivolous" contentions.<sup>4</sup>

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<sup>3</sup> That is the action taken by the Commission in *Casper, Wyoming*, 15 FCC Rcd 15806 (2000).

<sup>4</sup> One might think a "frivolous" pleading could safely be ignored.

Without foundation, Sinclair claims that Tidewater has mischaracterized the facts and a complete and accurate record won't exist unless Sinclair can respond. This is based, in part, on Tidewater's failure to mention a letter regarding Poquoson about which Sinclair admits Tidewater could have had no knowledge (See Motion footnote 1). With regard to that point, if it were so important, Sinclair could have attached a copy of the letter to its Counterproposal.

This Commission will not be fooled by Sinclair's antics. Although it is axiomatic that counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments, Sinclair is, nonetheless, trying to correct its flawed proposal, which is impermissible. Case after case restates this core principle. See *Broken Arrow and Bixby, Oklahoma*<sup>5</sup>, where the Commission said "Counterproposals must be technically correct at the time of their filing so that all parties are afforded an opportunity to respond in reply comments. Therefore, we shall not accept [counterproponent's] Supplemental Comments which attempts to correct the deficiencies in its counterproposal" In *Springdale, Arkansas, et al.*<sup>6</sup>, the Commission refused to place a counterproposal on public notice because the reference coordinates were short spaced to a constraint: "Although CBC attempted to correct the deficiencies in an amendment, arguing that the new reference coordinates supplied in the amendment were submitted in order to correct a typographical error in the counterproposal, the amendment is equally unacceptable. ...

Counterproposals must be technically correct and substantially complete when filed in

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<sup>5</sup> 3 FCC Rcd 6507 (1988).

<sup>6</sup> 4 FCC Rcd 674 (1989).

order to afford all parties an opportunity to fully respond in reply comments.”<sup>7</sup> See *Rosendale, New York*,<sup>8</sup> at footnote 1 (“Counterproposals must be technically and procedurally correct and **may not be amended at a later date.** [Emphasis added]”). Sinclair’s unauthorized response should not be accepted and the counterproposal should be dismissed as inadvertently placed on public notice.

Sinclair cannot support its unprecedented request to rewrite its counterproposal, since all the cases are squarely against Sinclair. It cites only one case, *Brightwood, Oregon*<sup>9</sup>, hoping to persuade the Commission to accept its unauthorized Response. Therein, at footnote 6, the Commission denied a motion filed by Muddy Broadcasting Company (“MBC”) to strike Reply Comments timely-filed by Madras Broadcasting (“Madras”) in response to a Public Notice accepting a counterproposal filed by Madras. MBC argued that Madras’ Reply Comments were unauthorized since they addressed matters previously raised by MBC on the date for filing replies to the original Notice of Proposed Rule Making. Madras’ Reply Comments were timely and addressed matters raised, perhaps prematurely from a tactical viewpoint, by MBC. As such they were not “unauthorized.” Here, Sinclair acknowledges that its Response is unauthorized and is seeking leave to file it in an attempt to rectify its defective counterproposal. Although Tidewater will not formally respond with a point-by-point rebuttal to Sinclair’s Response

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<sup>7</sup> See also, *Provincetown, Massachusetts*, 8 FCC Rcd 19 (1992) (“Counterproposals must be technically correct and substantially complete where filed. At a minimum, we have held that the petitioner must provide the specific channel and class, specific transmitter site coordinates, and engineering studies which indicate that the station would meet minimum separation and city grade coverage requirements...”).

<sup>8</sup> 10 FCC Rcd 11471 (1995).

<sup>9</sup> DA 01-2484, released October 26, 2001.



at this time, Tidewater must make reference to various sections of the Response since Sinclair has chosen to file its unauthorized response without first receiving leave from the Commission to do so. By filing its Response along with its Motion, Sinclair hopes to force the Commission to consider its pleading, but the Commission should not countenance such a “captive” pleading since Tidewater will not have had an opportunity to respond to it on the merits. The Commission should determine whether to consider the Response based entirely on Sinclair’s motion. However, should the Commission decide to officially consider Sinclair’s Response, Tidewater requests the Commission to afford Tidewater an opportunity to respond fully to Sinclair’s Response prior to Commission action.

In its unauthorized response, Sinclair relies on *Monck’s Corner, Kiawah Island and Sampit, North Carolina*,<sup>10</sup> as support for acceptance of its belated attempt to change reference coordinates. That case is inapposite. There, the Commission permitted a change in an original proposal – not a counterproposal as Sinclair states – and allowed it, in part, to “avoid further litigation.” Ignoring precedent and allowing Sinclair to correct its defective counterproposal will prejudice BBI’s properly filed original proposal. The cases Sinclair cites are easily distinguishable. In *Randolph and Brandon, Vermont*,<sup>11</sup> and likewise in *Rockport, Gregory, Alice and Armstrong, Texas*<sup>12</sup>, both cited by Sinclair, the Commission, on its own motion, found alternative sites because it appeared the original

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<sup>10</sup> 15 FCC Rcd 8973 (2000).

<sup>11</sup> 6 FCC Rcd 1760, 1761 (1991).

<sup>12</sup> 4 FCC Rcd 8075, 8076 (1989).

sites were in swamps. In *Homerville, Lakeland and Statenville, Georgia*,<sup>13</sup> the Commission's own analysis found an alternate site on dry land because of a defect in the initial petitioner's showing. But, none of these cases involve a counterproposal where other parties' rights would be prejudiced. That is an important distinction.

The actual issues here are lack of notice and denial of due process to the parties. Sinclair knew that its counterproposal must, indeed, meet a "go-no go" test. It is not Tidewater, as Sinclair suggests, but the Commission, that has, time after time, cautioned those who would file counterproposals that their submissions must be technically and procedurally correct when filed. Sinclair cites *Boalsburg, Pennsylvania*,<sup>14</sup> for the proposition that minor curative submissions have not been absolutely prohibited under *Scottsboro, Alabama, Trenton, Georgia, and Signal Mountain, Tennessee*.<sup>15</sup> But the relevant case involved late-filing a verification because a non-lawyer submitted the original petition without such a verification. Such a curative submission does not alter the facts of the case and is not prejudicial to any party. What Sinclair wants to do is submit 162 pages of supplemental information. Considering that mountain of paper at this juncture is most certainly is prejudicial to BBI and Tidewater because they timely filed their pleadings in compliance with the rules while Sinclair has not. Sinclair, deploying its cynical plan to sneak in under the radar by filing a counterproposal, took advantage of the Commission's policies to cut off any opportunities for other parties to file conflicting proposals. When Sinclair took this route, it assumed the well-known risk

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<sup>13</sup> 8 FCC Rcd 2953, 2954 (1993).

<sup>14</sup> 7 FCC Rcd 7653, 7654, n. 17 (1992).

<sup>15</sup> 6 FCC Rcd 6111 (1991).

that it must file a virtually perfect counterproposal or face dismissal. Because of this, Sinclair's counterproposal must rise or fall on the strength of its June 3, 2002, submission alone. Since BBI and Tidewater had only the right to reply to the counterproposal as filed, patching up Sinclair's tatterdemalion counterproposal at this juncture would, therefore, fly in the face of due process and fair treatment to BBI and Tidewater.

### **Sinclair's Response Does Not Cure the Fatal Defects**

**Reference Site.** Tidewater supplied evidence in the form of a topographic map showing that Sinclair's reference site was offshore. Accepting any other evidence would require the Commission to select from potentially contradictory sources. The best evidence is the topographic map. Assuming, *arguendo*, that Sinclair could persuade the Commission to ignore its well-established rules and consider its response, the Commission would be wasting its time. Although Sinclair claims (without providing legal authority for the statement) that actual survey measurements "trump" a topographical map, Sinclair has not provided any evidence that rebuts Tidewater's previous showings. Sinclair has provided a declaration (Sinclair Exhibit No. 2) from its chief engineer, L. Joseph Hardin, that is irrelevant. Hardin swore under penalty of perjury that he measured Sinclair's reference site with a GPS receiver and found the site at **North Latitude 37° 12' 30.0" and West Longitude 76° 29' 05.0"** to be on land. The Technical Exhibit (Attachment A) prepared for Tidewater shows that the site Mr. Hardin says he measured is indeed on land, but the site is short spaced to Station WRDU, Wilson, NC, by 4.58 km. Since that site, verified to be accurate by Hardin, is short spaced and unusable, it does not rebut Tidewater's showings.

Sinclair seems to concede that its reference site is off shore according to the topographic map; and should the Commission confirm this, Sinclair would like to specify an alternate reference site: **North Latitude 37° 12' 30.0" and West Longitude 76° 29' 07.0"** (See Sinclair Exhibit No. 1, Technical Comments of Graham Brock, page 2). The attached Technical Exhibit shows that this site is also on land but is also unusable since it is not proximate to the specified reference site and is 4.61 km short spaced to WRDU and would not provide city-grade service to all of Poquoson.<sup>16</sup> Even if Sinclair could get its story straight, figure out where its reference site is, and specify a site on land that would meet spacing and city-grade requirements, it is too late to amend the counterproposal to change the reference coordinates. Sinclair says, "It would be illogical to impose a stricter standard on hypothetical reference coordinates in a rule making, and, again, the Commission has not." The converse, instead, is true. For example, parties in allotment proceedings may not specify hypothetical sites that are short spaced, while parties in application proceedings may do so under certain circumstances.<sup>17</sup>

Moreover, even if the Commission were to allow Sinclair to specify a new set of reference coordinates in the area near its original reference site, the proposed area would be unsuitable for a radio tower. Attachment B hereto is a Declaration of Tidewater's Chief Operator, Donald Crowder, who investigated the suitability of area near the reference site and found that under the York County Zoning Code, a radio tower in the

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<sup>16</sup> Sinclair's reference to Section 73.1690(c)(ii) is misplaced. That section allows minor changes to existing authorizations when filed on FCC Form 302 (application for license) but is inapplicable to allotment proceedings.

<sup>17</sup> See *Fort Bragg, California*, 6 FCC Rcd 5817 (1991) (Waivers of Rule 73.315(b) in connection with an application for construction permit are not available to parties in the allotment context.)

area would require a special permit. Additional approvals also would be required. Mark Hobbs of the department of Environmental and Development Services told Mr. Crowder that:

1. The location falls within the Chesapeake Bay Preservation Area and will require an approval from them.
2. The location will require approval by the Wetlands Board.
3. The location will require approval from the Army Corps of Engineers.
4. The location is zoned Residential and a tower could not be built without a special use permit.

Tim Cross, the person in the York County Planning Commission that would be the first to handle an application for any tower in York County, assured Mr. Crowder that no one has applied for a permit to build a tower in the vicinity of Sinclair's reference coordinates, and that any attempt to build a tower at that location would cause him "real concern". As Tidewater has previously shown, Sinclair's proposed reference site is unsuitable, rendering its proposal defective and subject to dismissal.

**Community Status of Belle Haven.** In its response, Sinclair attempts to bolster its claim that Belle Haven is a community for allotment purposes. It submits as Sinclair Exhibit No. 6 a declaration of Sinclair's Operations Manager, David Morgan. His declaration is an attempt by Sinclair to repair the defects in its original counterproposal and may not be considered. See *Broken Arrow and Bixby, Oklahoma*, and *Springdale Arkansas et al., supra*. Sinclair has made no showing in its Motion for Leave that the new information it would like to proffer was not available on June 3, 2002, the date Sinclair filed its Counterproposal. The recent information does not rebut Tidewater's

showing and consists mainly of photographs of “businesses and other organizations” that are not even in Belle Haven. While Tidewater gave credit to Belle Haven for four businesses, there may be fewer. According to the list provided by Sinclair’s Operations Manager, there are three businesses (Idle Hour Theatre, Phillips’s Store and the McCaleb-Metzler Insurance Agency); the U. S. Post Office; and two churches (Belle Haven Presbyterian and Belle Haven Methodist) in Belle Haven. The other “businesses and other organizations” appear to be nothing more than residences where the inhabitants work at home (Eastern Shore Community Services Board Parents – Infants (PIPS) Facility, Head Start Facility, Eastern Shore Marine Construction, Sam White Mower Repair, and ESO Arts Center).<sup>18</sup> For good measure, Sinclair throws in the mix as “organizations” the CATV Head-End (presumably, an unmanned receiving and cable television distribution facility), a **cemetery**, and some **apartments**. Sinclair cannot deny that its own information does not contradict the description Tidewater’s president provided in Tidewater’s Reply Comments. The conclusion is inescapable that in the case of Belle Haven, there is “no there there.”

That there are some businesses outside Belle Haven has no bearing on the community status of Belle Haven. Sinclair has cited no cases to support inclusion of these extraneous elements in determining the attributes of Belle Haven. The two “declarations” of H. A. Floyd, the mayor, and Herbert Thom, Jr., a town councilman, are unpersuasive. They were apparently drafted by Sinclair with blanks for the gentlemen to fill in. They are not declarations, in that they are not executed “under penalty of perjury”

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<sup>18</sup> If one also considers Eastern Shore Marine Construction, Sam White Mower Repair to be businesses, it brings the grand total of businesses to five.

as required by Title 47 C.F.R. §1.16. Therefore, they are not probative of anything and may not be considered.

**Failure of Poquoson to Meet the *Tuck* Test.** Hurling invective, Sinclair attempts to fix its defective counterproposal by attempting to rebut Tidewater's showing that Poquoson fails the test of *Faye and Richard Tuck*.<sup>19</sup> Sinclair may not do so.<sup>20</sup> It is clear, however, that Poquoson does not merit a first local service preference. Sinclair has not shown why it could not have provided its supplemental information on June 3, 2002, the comment date fixed by the Notice of Proposed Rule Making, so that interested parties would have had an opportunity to comment on the material. Thus, the additional information may not be considered, and need not be commented on further here.<sup>21</sup>

**Sinclair's Proposal Eliminates the Only Commercial Service to Cape Charles.** Sinclair also attempts to rebut Tidewater's showing that Sinclair's proposal would eliminate the only commercial station in Cape Charles. Tidewater showed that noncommercial FM station WAZP, Cape Charles, should not count as a station that will continue to provide local service to Cape Charles as a replacement for WROX.

Tidewater showed that WAZP is not equivalent to WROX. At paragraph 15, Sinclair

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<sup>19</sup> 3 FCC Rcd 5374 (1988).

<sup>20</sup> One aspect of this section of Sinclair's pleading merits a response. Sinclair claims that Tidewater has ignored a June 4, 2002, "Errata and Supplement" that includes a letter from a chamber of commerce official. As that document is not a part of the record, Tidewater could hardly have been aware of it in order to ignore it.

<sup>21</sup> Another curious aspect of Sinclair's pleading is its presentation as Exhibit No. 4 of statistics concerning "cities" in Virginia that do not have local radio stations. That information is irrelevant and not subject to consideration by the Commission. However, following Sinclair's logic, if that information were accepted, it would indicate that the "town" of Belle Haven is not a "city" and is thus not entitled even to the rebuttable presumption of community status. (Exmore and Cape Charles are "towns.")

notes that in the case of *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*<sup>22</sup>, the noncommercial station was upgraded and reconsideration was granted on that basis. However, it should be noted that in that case, when upgraded, the noncommercial station more than replicated the signal of the commercial station being removed. That is not the case with respect to WROX and WAZP.

**Improper Attempt to Amend Counterproposal.** As mentioned *supra*, in Footnote 14 of its Response, Sinclair improperly attempts to amend its counterproposal. In another instance of trying to sneak in under the radar, Sinclair sheepishly indicates that if the Commission agrees with Tidewater that Belle Haven doesn't qualify as a community for allotment purposes, Sinclair would like the "allotment of Channel 291A to Poquoson to be addressed in this rule making." It bases this remarkable request on the fact that "Tidewater has not disputed that the Counterproposal was a properly filed, mutually exclusive, counterproposal, and with the Poquoson allotment now having been put on public notice and challenged, it is ripe for resolution regardless of whether a channel is allotted to Belle Haven." This is impermissible under the many precedents cited herein (*Rosendale, New York, supra*). If the Commission agrees with Tidewater that the hamlet of Belle Haven is not a community for allotment purposes, Sinclair's counterproposal must be denied since it will no longer be mutually-exclusive with BBI's proposal at Crisfield. Tidewater has, most assuredly, disputed that the Counterproposal was a properly filed one, and has labeled it a sham from the very beginning of

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<sup>22</sup> 16 FCC Rcd 1525 (2000), recon. denied, 16 FCC Rcd 7979 (2002); recon. granted, DA 02-1877, released August 2, 2002.



Tidewater's participation in this proceeding.<sup>23</sup> If the Commission agrees that Sinclair's proposal is defective, the appropriate course is to issue a Further Notice of Proposed Rule Making directed toward the question of whether to relocate WROX to Poquoson. That would permit other parties the opportunity to fully participate in order for the Commission to make a preferential arrangement of allotments.

### Conclusion

Despite Sinclair's frantic efforts to correct the defects in its counterproposal, it is obvious that the counterproposal was defective when filed. Sinclair's weighty and prolix "response" is *res ipsa loquitur* that Sinclair recognizes that it has failed to clear the bar. As a result, Sinclair's counterproposal must be considered to have been inadvertently placed on public notice. In light of that, it should be dismissed so that the competing proposal of BBI to exchange Channel 250A for Channel 245A at Crisfield, Maryland, can be granted.

Respectfully submitted,

A large, stylized handwritten signature in black ink, starting with a large 'G' and ending with a long horizontal stroke.

TIDEWATER COMMUNICATIONS, INC.

Gary S. Smithwick  
Its Attorney

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August 28, 2002

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<sup>23</sup> See Tidewater's Reply Comments, "Frustrated with this band-aid approach, under the cover of allotting a first local service to Belle Haven, Sinclair has now concocted this Counterproposal for the sole reason of moving WROX closer to downtown Norfolk! This is nothing more than a proposal to add the **40th** signal to the already over-radioed Norfolk Arbitron market."

# **Attachment A**

**TECHNICAL EXHIBIT**  
**In Opposition To Commonwealth/Sinclair Motion**  
**Add Channel 291A to Poquoson, VA**  
August 2002

These Technical Comments are made on behalf of Tidewater Communications, Inc. ("Tidewater") in support of Tidewater's Opposition to Counter Proponents' Motion for leave to file response to Reply Comments on Counterproposal. The Commonwealth/Sinclair ("Sinclair") Motion proposes to add Channel 291A to Poquoson, Virginia.

When plotted on a US Geological Survey 7.5 minute Quadrangle Map the proposed reference site is off shore<sup>1</sup>. The Commission's Policy has been to resolve site and terrain discrepancies using this type of government map.

Sinclair used an alternative method of prediction of coordinates by using a Global Positioning System ("GPS")hand held receiver. In an affidavit by Sinclair's engineer, several photographs were attached showing him standing on land. Moreover, in the affidavit he swore that his GPS receiver indicated that the coordinates of that location are North Latitude 37° 12' 30.5" and West Longitude 76° 29' 03.8" using North American Datum 1983. Sinclair then converted those coordinates to NAD-27 NL 37° 12' 30" and WL 76° 29' 05". From this information, we plotted these coordinates on a USGS 7.5 minute topographic map. We agree with the affiant that this site is on land. However, the site shown by the Sinclair engineer is 5.92 km west or *nowhere near* the originally proposed reference site of the Sinclair Proposal for Channel 291A at Poquoson.

In the Sinclair Technical Statement, another reference site was picked. Sinclair stated: "*...the reference site will plot on land on the 7.5 minute map submitted by TCI on Exhibit #2....*". The new reference point as proposed by Sinclair is located at North Latitude 37° 12' 30" and West Longitude 76° 29' 07". We agree that this site is on land when plotted on a 7.5 minute topographic map.

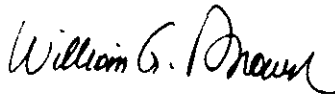
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<sup>1</sup> The original site reference for Channel 291A at Poquoson, VA is North Latitude 37° 12' 30" and West Longitude 76° 25' 05".

However, our FM Allocation Study shows this site to be 4.61 km shortspaced to WRDU, Channel 291C at Wilson, North Carolina per Section 73.207. Furthermore, from this site utilizing a maximum Class A facility, the 70 dBu contour does not cover all of the proposed community of license per Section 73.213.

In conclusion, the location shown in the affidavit by Sinclair's engineer NL 37° 12' 30.5", WL 76°29' 03.8" NAD-83 and converted to NL 37° 12' 30" and WL 76° 29' 05" NAD-27 is on land. The newly proposed reference site as proposed by Sinclair's Consultant at NL 37° 12' 30", WL 76° 29' 07" is also on land. However, neither of these locations meets the provisions of §73.207 for spacing or §73.213 for coverage of the proposed community of license.

Bromo Communications, Inc.

A handwritten signature in black ink, appearing to read "William G. Brown". The signature is fluid and cursive, with the first name "William" and last name "Brown" clearly distinguishable.

William G. Brown  
Technical Consultant to Tidewater Communications, Inc.

## **Attachment B**

## DECLARATION OF DONALD CROWDER

Donald Crowder, under penalty of perjury, declares as follows:


I am Chief Operator for Tidewater Communications, Inc. I have investigated the feasibility of the construction of a tower in the area specified for the use of Channel 291A at Poquoson, Virginia, for use by WROX, Cape Charles, Virginia.

Attached is a copy of the York County Zoning that clearly shows that a proposed tower will require a special permit. Mark Hobbs with the department of Environmental and Development Services told me the following when I met with him on August 23, 2002:

1. The location falls within the Chesapeake Bay Preservation Area and will require an approval from them.
2. The location will require approval by the Wetlands Board.
3. The location will require approval from the Army Corp of Engineers.
4. The location is zoned Residential and a tower could not be built without a special use permit.

Mr. Hobbs gave me the number for the person in the York County Planning Commission that would be the first to handle any application for any tower in York County. His name is Tim Cross. I spoke to him on August 26, 2002, and he assured me that no one has applied for a permit to build a tower at the end of Dandy Haven Lane. He stated that any attempt to build a tower at this location would cause him "real concern".

Executed this 28 day of August, 2002.

  
Donald Crowder

Sec. 24.1-30. Prohibited uses.

The following uses shall be prohibited in the county:

York County  
VIRGINIA  
Department of Environmental & Planning Services  
Division of Development & Compliance  
Planner I  
Mark A. Hobbs

- (a) Smelting;  
(b) Nuclear or other radioactive manufacturing;  
(c) Nuclear waste processing or disposal;  
(d) Biohazard waste processing or disposal; and

(e) Manufacture, transformation, or distribution of biologically accumulative poisons or other poisons that are or ever were registered in accordance with the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC 135, et seq.).

Secs. 24.1-30.8-24.1-319. Reserved

DIVISION 2. RESIDENTIAL DISTRICTS

Sec. 24.1-32. Purpose of residential districts.

The purpose of the residential districts is to provide a full range of opportunity in accordance with the comprehensive plan, and specifically the housing element and land use element, for the orderly, healthful, convenient, and affordable distribution of housing throughout the county. A variety of densities and housing arrangements is provided based on the availability of the public service infrastructure necessary to serve development. The lower density arrangements have been established

**CERTIFICATE OF SERVICE**

I, Sherry L. Schunemann, do hereby certify that on this 28<sup>th</sup> day of August, 2002, I caused copies of the foregoing "Tidewater's Opposition to Counterproponents' Motion for Leave to File Response to Reply Comments on Counterproposal" to be delivered, via United States Mail, postage prepaid, or as otherwise specified, to the following individuals:

Howard M. Weiss, Esquire  
Fletcher, Heald & Hildreth, PLC  
1300 North 17<sup>th</sup> Street  
11<sup>th</sup> Floor  
Arlington, Virginia 22209-3801

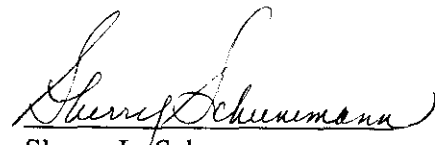
Lauren A. Colby, Esquire  
Law Offices of Lauren A. Colby  
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**Hand Delivery:**

John Karousos  
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Federal Communications Commission  
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**Hand Delivery:**

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Federal Communications Commission  
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Sherry L. Schunemann